

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DR. IBELKA VARGAS, and the class of	:
those persons similarly situated,	:
	:
Plaintiffs,	:
-v-	:
	:
CHOICE HEALTH LEASING,	:
	:
Defendant.	:
-----X	

OPINION AND ORDER

09 Civ. 8264 (DLC)

APPEARANCES:

For Plaintiffs:

Phillip Jaffe
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For Defendant:

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599 Lexington Avenue
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-and-

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DENISE COTE, District Judge:

Plaintiff Ibelka Vargas ("Vargas" or "the plaintiff") -- by and through her counsel, Phillip Jaffe ("Jaffe"), who was formerly a named plaintiff in this lawsuit -- brings this putative class action challenging the lawfulness of late fees she incurred in connection with a lease of certain dental

equipment. Jaffe was listed as the lessee. On January 21, 2011, defendant Choice Health Leasing ("Choice") moved to dismiss the plaintiffs' second amended complaint (the "Second Amended Complaint"). For the following reasons, the motion to dismiss is granted.

BACKGROUND

The factual background to this case has already been described in an Opinion of August 26, Vargas v. Choice Health Leasing, No. 09 Civ. 8264 (DLC), 2010 WL 3398482 (S.D.N.Y. Aug. 26, 2010) (the "August Opinion"), familiarity with which is assumed. Only the facts necessary to a resolution of the pending motion are included here. These facts, taken from the Second Amended Complaint and its attachments, are assumed to be true for the purposes of deciding the motion.¹

After graduating from dental school, Vargas sought to rent the office space and the equipment necessary to establish a dental practice. Vargas asked Jaffe to co-sign the lease for office space and to lease "in his name" dental equipment from Choice. While Jaffe is "legally responsible for any

¹ "In determining the adequacy of the complaint, the court may consider any written instrument attached to the complaint as an exhibit or incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint." Subaru Distribs. Corp. v. Subaru of Am., Inc., 425 F.3d 119, 122 (2d Cir. 2005).

indebtedness" to Choice, pursuant to an oral contract between Vargas and Jaffe, Vargas "has made all payments on equipment" to Choice.

Initially, Vargas made her payments to Choice on time or "near the deadline." At some point, Vargas spoke with a person "associated with Choice[]," who informed her that "if she paid the monthly fee on the day it was due by telephone . . . her payment would be timely and [would] not . . . trigger[] a 'late payment' fee." Nonetheless, in some instances, when Vargas paid on time by telephone she was assessed late fees. Vargas incurred twenty-one late fees based on fifty-five timely telephone payments, and twenty-nine late fees from sixty-eight timely telephone payments. Vargas paid Choice \$228,671.29 in principal and interest and \$24,206.93 in late fees on a \$200,000 loan.

PROCEDURAL HISTORY

On September 29, 2009, Jaffe, proceeding pro se, filed this lawsuit as a purported class action against Choice and Citibank, N.A. ("Citibank") for violating various federal and state laws (the "Initial Complaint"). On October 28, Choice and Citibank filed separate motions to dismiss the Initial Complaint. In his opposition to these motions, Jaffe sought permission to add

claims. By Order dated January 11, 2010, Jaffe was directed to amend the pleading by February 5.

On or about February 2, Jaffe, now serving as counsel, filed an amended complaint on behalf of Vargas and a putative class of similarly situated persons (the "Amended Complaint"). Although the Amended Complaint did not include Jaffe as a plaintiff, he was still identified as "the legal owner of the equipment leased" from Choice, and the person "legally responsible for any indebtedness to Choice[]." Choice and Citibank moved to dismiss the Amended Complaint. In the August Opinion, Citibank's motion to dismiss was converted to a motion for summary judgment and granted. The August Opinion also dismissed the plaintiff's claims arising under the National Bank Act, 12 U.S.C. §§ 85-86, and the Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1831d. Plaintiff's civil claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) ("RICO") was dismissed with leave to amend by October 1.

On October 1, the Court received a letter from Jaffe accompanied by a document labeled "Second Amended Complaint and Demand for Jury." On December 3, Jaffe was given until December

10 to serve Choice with a copy of the Second Amended Complaint and until December 17 to file proof of service.²

On January 21, 2011, Choice filed a motion to dismiss the Second Amended Complaint. The motion became fully submitted on March 14.

DISCUSSION

Choice has moved to dismiss all of the claims asserted in the Second Amended Complaint pursuant to Rule 12(b)(6), Fed. R. Civ. P. "Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). For a plaintiff's claim to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570 (2007) (citation omitted)). Applying this plausibility standard is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

A court considering a motion to dismiss pursuant to Rule 12(b)(6) "must accept as true all allegations in the complaint

² To date, neither the Second Amended Complaint nor proof of its service has been filed correctly.

and draw all reasonable inferences in favor of the non-moving party." Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 115 (2d Cir. 2008) (citation omitted). A complaint must do more, however, than offer "naked assertions devoid of further factual enhancement," and a court is not "bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 129 S. Ct. at 1949-50 (quoting Twombly, 550 U.S. at 555, 557).

I. Federal Claim

Vargas's only federal claim in the Second Amended Complaint is a civil RICO claim brought pursuant to 18 U.S.C. § 1962(a). Choice argues that Vargas has failed to plead any predicate acts of "racketeering activity" as defined in 18 U.S.C. § 1961(1).³

Section 1962(a) makes it illegal for any person "who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the

³ Since Vargas has failed to plead a "pattern of racketeering" within the meaning of 18 U.S.C. §§ 1962(a) and (c), it is not necessary to consider whether plaintiff has properly alleged the existence of an "enterprise" distinct from Choice, as required by § 1962. See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994) (plaintiff fails to state an actionable claim under § 1962 "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant").

establishment or operation of, any enterprise." 18 U.S.C. § 1962(a).⁴ A civil claim premised on a violation of § 1962(a) requires a showing that a defendant received income from a pattern of racketeering activity. Ouaknine v. MacFarlane, 897 F.2d 75, 82 (2d Cir. 1990). The phrase "pattern of racketeering activity" is defined in § 1961(5) as "requir[ing] at least two acts of racketeering activity," with "racketeering activity" in turn defined in § 1961(1) to mean any of a number of explicitly enumerated crimes. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985).

In seeking to demonstrate the existence of a "pattern of racketeering activity," the Second Amended Complaint alleges violations of 18 U.S.C. § 1344.⁵ To plead a violation of § 1344, Vargas must allege that Choice "knowingly execute[d], or attempt[ed] to execute, a scheme or artifice -- (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds

⁴ At certain points, the Second Amended complaint refers to § 1962(c). Even if plaintiff's RICO claim is asserted under that provision, plaintiff's claim would still be dismissed. Moss v. Morgan Stanely, Inc., 719 F.2d 5, 17 (2d Cir. 1983) (racketeering activity must be alleged for claims brought under §§ 1962(a), (b) and (c)).

⁵ The Second Amended Complaint also references 18 U.S.C. §§ 656 and 657. But as the August Opinion explains, neither of those statutes constitutes "racketeering activities" under 18 U.S.C. § 1961(1), which is the "exclusive" list of offenses satisfying the "racketeering activity" requirement. See Vargas, 2010 WL 3398482, at *6.

. . . owned by, or under the custody or control of, a financial institution." 18 U.S.C. § 1344 (emphasis supplied). Section 1344 was designed to prosecute "frauds in which the victims are financial institutions that are federally created, controlled, or insured." Bank of China, N.Y. Branch v. NBM LLC, 359 F.3d 171, 177 (2d Cir. 2004) (citation omitted)). Liability under § 1344 may not be established "by evidence merely that some person other than a federally insured financial institution was defrauded in a way that happened to involve banking, without evidence that such an institution was an intended victim." United States v. Laljie, 184 F.3d 180, 189-90 (2d Cir. 1999).

Vargas asserts that Choice intended to defraud plaintiff and a purported class of other similarly situated borrowers. The Second Amended complaint, however, does not allege that Vargas or any of the other similarly situated borrowers were "financial institutions" within the meaning of § 1344. Choice's motion to dismiss Vargas's civil RICO claim is therefore granted.

Vargas argues that by pleading the existence of a scheme to defraud a bank's customers, she has stated a violation of § 1344. In a similar vein, plaintiff contends that a defendant need not have intended a bank to be the primary target of a fraud in order for § 1344 to apply. Both of these arguments lack merit. Plaintiff largely relies on United States v.

Brandon, 17 F.3d 409 (1st Cir. 1994), in which the First Circuit held that a § 1344 claim may be established when a defendant "knowingly executed a fraudulent scheme that exposed a federally insured bank to a risk of loss," even when the alleged scheme was not "directed solely toward a particular institution." Id. at 426. Nothing in the Second Amended Complaint suggests, however, that a federally insured bank was exposed to a risk of loss or was an indirect target of Choice's alleged scheme.

II. State Law Claims

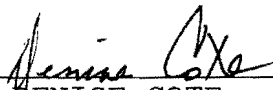
As there are no longer any federal claims in this action, it is within the Court's discretion whether to exercise supplemental jurisdiction over the plaintiff's remaining claims under state law, including her claims for fraud, defamation, conversion, unjust enrichment, usury, and intentional infliction of emotional distress lending. Klein & Co. Futures, Inc. v. Bd. of Trade of City of N.Y., 464 F.3d 255, 262-63 (2d Cir. 2006). "It is well settled that where, as here, the federal claims are eliminated in the early stages of litigation, courts should generally decline to exercise pendent jurisdiction over remaining state law claims." Id. at 262. Accordingly, the Court declines to exercise supplemental jurisdiction and need not address Choice's argument that plaintiff fails to allege a claim under state law.

CONCLUSION

Choice's January 21, 2011 motion to dismiss is granted. The Clerk of Court shall enter judgment for defendants on the federal civil RICO claim. The state law claims are dismissed without prejudice to refiling in state court. The Clerk of Court shall close the case.

SO ORDERED:

Dated: New York, New York
May 9, 2011



DENISE COTE
United States District Judge